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March 11, 2004
DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Appeal

Name of Case: Worker Appeal
Date of Filing: December 3, 2003
Case No.: TIA-0038

XXXXXXXXXXXXXXXXXXXXX (the applicant) applied to the Office of Worker Advocacy of the Department of Energy (DOE) for DOE assistance in filing for state workers' compensation benefits. The applicant's late husband (the worker) was a DOE contractor employee at a DOE facility. Based on a negative determination from an independent Physician Panel, the DOE Office of Worker Advocacy (OWA or Program Office) determined that the applicant was not eligible for the assistance program. The applicant appeals that determination. As explained below, the appeal should be denied.

I. Background

The Energy Employees Occupational Illness Compensation Program Act of 2000 as amended (the EEOICPA or the Act) concerns workers involved in various ways with the nation's atomic weapons program. See 42 U.S.C. §§ 7384, 7385.

This case concerns Part D of the Act, which provides for a DOE program to assist Department of Energy contractor employees in filing for state workers' compensation benefits for illnesses caused by exposure to toxic substances at DOE facilities. 42 U.S.C. § 7385o. The DOE Office of Worker Advocacy is responsible for this program and has a web site that provides extensive information concerning the program. 1/

Part D establishes a DOE process through which independent physician panels consider whether exposure to toxic substances at DOE facilities caused, aggravated or contributed to employee illnesses. Generally, if a physician panel issues a determination favorable to

1/ See www.eh.doe.gov/advocacy.

the employee, the DOE Office of Worker Advocacy accepts the determination and assists the applicant in filing for state workers' compensation benefits. In addition, the DOE instructs the contractor not to oppose the claim unless required by law to do so, and the DOE does not reimburse the contractor for any costs that it incurs in opposing the claim. 42 U.S.C. § 7385o(e)(3). The DOE has issued regulations to implement Part D of the Act. These regulations are referred to as the Physician Panel Rule. See 67 Fed. Reg. 52841 (August 13, 2002) (to be codified at 10 C.F.R. Part 852). As stated above, the DOE Office of Worker Advocacy is responsible for this program.

The Physician Panel Rule provides for an appeal process. As set out in Section 852.18, an applicant may request the DOE's Office of Hearings and Appeals (OHA) to review certain Program Office decisions. An applicant may appeal a decision by the Program Office not to submit an application to a Physician Panel, a negative determination by a Physician Panel that is accepted by the Program Office, and a final decision by the Program Office not to accept a Physician Panel determination in favor of an applicant. The instant appeal is filed pursuant to that Section. Specifically, the applicant seeks review of a negative determination by a Physician Panel that was accepted by the Program Office. 10 C.F.R. § 852.18(a)(2). See *Worker Appeal* (Case No. TIA-0025), 28 DOE ¶ 80,294 (2003).

In her application for DOE assistance in filing for state workers' compensation benefits, the applicant asserted that from 1962 through 1994, her husband worked as an engineer at the DOE's Y-12 plant in Oak Ridge, Tennessee. The worker died in 1994 of amyotrophic lateral sclerosis (ALS). The applicant believes that exposure to mercury and radiation in the Y-12 workplace caused her husband's disease and his death.

The Physician Panel issued a negative determination on this claim. The Panel found that the worker's illness did not arise "out of and in the course of employment by a DOE contractor and exposure to a toxic substance at a DOE facility." The Panel based this conclusion on the standard of whether it believed that "it was at least as likely as not that exposure to a toxic substance at a DOE facility during the course of the worker's employment by a DOE contractor was a significant factor in aggravating, contributing to or causing the worker's illness or death."

In considering the worker's death from ALS, the Physician Panel unanimously found that a "causal connection between ALS and mercury

exposure is not established, nor is evidence of such exposure. [The worker's] symptoms and signs are not those of chronic mercury poisoning."

II. Analysis

The applicant seeks review of the Panel's determination, maintaining that the Panel did not reach a correct determination on the issue of whether mercury and/or radiation exposure caused her husband to die of ALS. She has submitted three newspaper/magazine articles that she alleges support her position on both exposures.

The articles offer no evidence of error by the Panel. The first article submitted by the applicant is undated and entitled "A week of golf--and life." ^{2/} It focuses on a professional golfer suffering from ALS, who states that he is undergoing treatment to remove mercury from his system and "is hopeful that might explain what caused ALS."

The second article is entitled "ALS Updates," and is taken from "News from the Les Turner ALS Foundation." The article appears to date from 2003. This article refers to an ALS mortality study that was prompted by concerns of some workers and community residents of Kelly Air Force Base that there were "health threats from toxic chemicals or radiation" at the Base or in the local environment. The study concluded that the number of ALS deaths at the Base was not excessive. The article indicates that another study is underway to examine common characteristics of ALS sufferers, and notes that some ALS deaths may not have been included in the mortality study.

The third article, dated November 16, 1997, is taken from "The Tennessean," and is entitled "What's next in Oak Ridge?" The subject of this article is health and learning problems in Oak Ridge that possibly were caused by environmental contamination. It indicates in a general way some approaches to these problems. One suggested approach was to extract hair, blood and urine samples from ill residents in the area to see if the samples contain high levels of poisons, among them uranium and other heavy metals and mercury. Another solution mentioned is to poll doctors about their experience with neurological diseases such as ALS and multiple sclerosis. The article did not offer any conclusions about the cause of ALS.

^{2/} The source of the article is not indicated.

These three articles merely point out that some people appear to be investigating the possibility of a link between ALS and environmental factors. None of the three articles in any way indicates that a link between ALS and radiation or mercury exposure has been demonstrated or is even likely.

As discussed above, the standard to be applied in these cases is whether it is at least as likely as not that exposure to a toxic substance at a DOE facility was a significant factor in aggravating, contributing to or causing the worker's illness or death. The Panel applied that standard here, and there is simply no evidence in the record, including the additional material submitted by the applicant, to suggest that the Panel's conclusion was incorrect. The articles that the applicant submitted do not in any way contradict the Panel's finding. The standard that the applicant seems to propose, that some people are considering the possibility that ALS is caused by mercury or radiation exposure, is not applicable in this type of case. 3/ The applicant has not pointed to any data in the record either contradicting the Panel's determination or suggesting that the Panel's overall decision was in error. Accordingly, the appeal must be denied.

In rejecting the applicant's contention that exposure to "nuclear material" may have caused her husband's ALS, I note that the Panel did not specifically address this aspect of the claim. However, this does not mean that the Panel failed to evaluate the whole file in the case and fully consider the individual's dosimetry record. We believe that the Panel rejected the contention that the worker's ALS was linked to radiation exposure. The report indicates that the Panel rendered an overall negative determination on the applicant's claim, and the Panel's discussion indicates that it considered possible causes of ALS. Therefore, I see no basis for remanding this aspect of the case to the Panel for a specific discussion on whether exposure to nuclear material caused the worker's ALS.

In sum, the applicant's beliefs, with nothing more, are not convincing. They do not establish any deficiency or error in the Panel's determination. Because the applicant has not identified a deficiency or error in the Panel's determination, there is no basis for an order remanding the matter to OWA for a second Panel determination. Accordingly, the appeal should be denied.

3/ Moreover, the record indicates that the level of the worker's exposure to mercury was within accepted limits.

IT IS THEREFORE ORDERED THAT:

- (1) The Appeal filed in Worker Advocacy Case No. TIA-0038 be, and hereby is, denied.
- (2) This is a final Order of the Department of Energy.

George B. Breznay
Director
Office of Hearings and Appeals

Date: March 11, 2004